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December 13, 2010

**VIA ELECTRONIC AND CERTIFIED MAIL**

Christopher Hughey  
Acting General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, DC 20463

Re: MUR 6405—Response of Friends of John McCain, Inc. (Thomas Holtrup,  
Treasurer)

Dear Mr. Hughey:

This is the response of Friends of John McCain, Inc. ("FOJM") to the meritless complaint filed by the Democratic Congressional Campaign Committee ("DCCC") in the midst of the mid-term election campaign. The DCCC requested that the Commission immediately enjoin FOJM's campaign advertisements because they were "wrongfully... tilt[ing] the balance in two contested House elections."<sup>1</sup> Recognizing, of course, that a competitive-injury claim is not cognizable, the DCCC advances two other accusations that are also unsupported: (1) FOJM's campaign ads caused an excessive in-kind contribution to two 2010 U.S. House candidates who ran for election in Arizona, Jesse Kelly and Ruth McClung; and (2) FOJM's campaign ads violated its authorized committee status.

FOJM responds fully to both of these DCCC accusations in the paragraphs below.

**I. ARGUMENT**

**A. FOJM's Campaign Communications Were Not In-kind Contributions to Jesse Kelly for U.S. Congress and Ruth McClung for Congress**

The DCCC's principal assertion is that FOJM made an excessive in-kind contribution to Jesse Kelly for U.S. Congress and Ruth McClung for Congress by sponsoring a "coordinated communication."<sup>2</sup> This assertion fails, though, because the communications were not coordinated.

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<sup>1</sup> Complaint at 3.

<sup>2</sup> Complaint at 2-3.

The DCCC promotes a novel theory of coordination-by-proximity, declaring it “utterly implausible” that a joint appearance at a rally by multiple federal candidates did not result in a “coordinated communication.”<sup>3</sup> But the Commission has never embraced the DCCC’s overbroad approach.<sup>4</sup> “Coordinated communication” has a specific legal meaning under Commission rules, and must involve the sharing of campaign strategy and plans, not simply appearing on the same stage.<sup>5</sup> Tellingly, the DCCC does not ever attempt to explain how the Commission’s “conduct standards” were met and does not allege any actual coordination-related facts.

FOJM carefully followed the Commission’s rules by independently creating, producing, and distributing its campaign advertisements. As detailed in the affidavit attached to this response, FOJM representatives did not receive any non-public information about the plans, projects, activities, or needs of Jesse Kelly for U.S. Congress or Ruth McClung for Congress that was material to the creation, production, or distribution of any FOJM independent-expenditure communication.<sup>6</sup> No agent of Jesse Kelly for U.S. Congress or Ruth McClung for Congress requested, suggested, or assented to any FOJM independent-expenditure communication.<sup>7</sup> No agent of Jesse Kelly for U.S. Congress or Ruth McClung for Congress had any material involvement in the creation, production, or distribution of any FOJM independent-expenditure communication.<sup>8</sup> And FOJM did not retain any commercial vendors or individuals who performed work for Jesse Kelly for U.S. Congress or Ruth McClung for Congress.<sup>9</sup>

Because FOJM has not sponsored any “coordinated communications,” it has not made an in-kind contribution to Jesse Kelly or Ruth McClung, contrary to the DCCC’s assertion.

**B. FOJM’s Campaign Communications Were Consistent with Its Authorized Committee Status**

The DCCC incorrectly claims that FOJM’s campaign communications “violated the conditions of its status as Senator McCain’s authorized committee”<sup>10</sup> Federal statute at Under Commission rules at 2 U.S.C. § 432(e)(3) declares: “No political committee which supports or has supported more than one candidate may be designated as an authorized committee.”<sup>11</sup>

<sup>3</sup> Complaint at 2-3.

<sup>4</sup> See 11 C.F.R. § 109.21(d)(4)-(5) (stating that even where a common vendor or former employee of a candidate is hired, the common vendor or former employee must “use or convey” material information in order for the conduct standard to be met).

<sup>5</sup> 11 C.F.R. § 109.21(d).

<sup>6</sup> Buse Aff. at ¶¶ 4, 5.

<sup>7</sup> Buse Aff. at ¶ 6.

<sup>8</sup> Buse Aff. at ¶ 7.

<sup>9</sup> Buse Aff. at ¶¶ 8, 9.

<sup>10</sup> Complaint at 3.

<sup>11</sup> 2 U.S.C. § 432(e)(3). See also 11 C.F.R. § 102.13(c)(1).

"Support" is not defined. And the Commission's rules state only that "support does *not* include contributions by an authorized committee in amounts aggregating \$2,000 or less per election."<sup>12</sup> Illogically, the DCCC twists this obvious safe harbor for \$2,000-and-under contributions into a ban on any activity that mentions another candidate. This contradicts common sense, the Commission's previous holdings, and Supreme Court jurisprudence.

FOJM's campaign communications were, in fact, consistent with its authorized committee status because the communications ultimately supported Senator McCain's candidacy and because FOJM was permitted to sponsor independent communications that referenced other candidates.

1. FOJM's Campaign Communications Supported Senator McCain's Candidacy

The DCCC's proffered authorized-committee restrictions ignore the fact that candidates on the same party ticket can affect each others' performances on Election Day. It also disregards the plain truth that building associations with other candidates and those candidates' supporters is a critical method of developing support for one's campaign.

The Commission's prior holdings recognized these campaign realities. In Matter Under Review 3676, for example, a congressional candidate's authorized committee ran an advertisement in his electoral jurisdiction shortly before his election that stated "Bart Stupak supports Bill Clinton for President."<sup>13</sup> The Commission rejected the Office of General Counsel's recommendation to find unlawful "support."<sup>14</sup> Commissioners recognized that "In campaigns, it is only natural for a candidate to seek votes by aligning himself with the most visible candidate in his party and support issues that candidate is espousing."<sup>15</sup> By contrast, in Matter Under Review 2841, a Georgia congressman's authorized committee used campaign funds to endorse Dick Gephardt in the Georgia presidential primary, an election in which the congressman was not running.<sup>16</sup> The Commission found probable cause to believe that the authorized committee rendered impermissible "support."<sup>17</sup> Thus, an authorized committee may have less flexibility running ads that promote, attack, support, or oppose other candidates wholly outside of its electoral jurisdiction or when its candidate is not up for election. But the Commission has never used committee status to restrict an authorized committee's discretion to decide which communications best serve its electoral purposes when run in its electoral jurisdiction shortly before its candidate's election.

<sup>12</sup> 11 C.F.R. § 102.13(c)(2) (emphasis added). See also 2 U.S.C. § 432(e)(3)(B).

<sup>13</sup> See generally, Fed. Election Comm'n, Matter Under Review 2841 (1995).

<sup>14</sup> Fed. Election Comm'n, Matter Under Review 2841, Certification (Jan. 10, 1994) (stating that Commissioners voted 4-2 to reject the General Counsel's recommendation that a violation of 2 U.S.C. s. 432(e) occurred).

<sup>15</sup> Fed. Election Comm'n, Matter Under Review 2841, Statement of Reasons by Commissioners Aikens, Elliott and Potter at 3 (Mar. 9, 1995). See also Fed. Election Comm'n, Matter Under Review 2841, Statement of Reasons by Commissioner Thomas at 4 (Feb. 8, 2005) (remarking that "One could argue that the primary intent of the communication was to influence Stupak's own election...")

<sup>16</sup> See generally, Fed. Election Comm'n, Matter Under Review 2841.

<sup>17</sup> Fed. Election Comm'n, Matter Under Review 2841.

Despite these clear standards laid down by the Commission in previous Matters, the DCCC would use FOJM's authorized committee status to restrict Senator McCain's autonomy in crafting his campaign message and advancing his candidacy. The absurdity of the DCCC's interpretation is apparent when applied to a different, hypothetical context. For example, if FOJM sponsored a campaign rally during the 2010 election, the DCCC would favor a ban on Senator McCain discussing other Arizona candidates at the event because FOJM's campaign funds defrayed event expenses. That preposterous result would run contrary to what occurs at most campaign events across the country. Senator McCain ran at the top of the Arizona Republican ticket and would be free at this hypothetical rally to discuss issues and persons in any way he believed would aid his candidacy.

FOJM's campaign advertisements, at issue here, were consistent with its authorized committee status and with past Commission holdings. Just like the congressman in Matter Under Review 3676, Senator McCain expressed enthusiasm for other candidates in the course of his re-election campaign, but all FOJM advertisements ultimately supported Senator McCain's candidacy.<sup>18</sup> FOJM's advertisements featured Senator McCain's voice and image. They were disseminated exclusively in Arizona, where Senator McCain was a candidate.<sup>19</sup> They were distributed shortly before the 2010 general election, when Senator McCain appeared on the ballot.<sup>20</sup> They showed Senator McCain discussing issues and persons of interest to Arizona's ideological conservatives, a crucial constituency for Senator McCain re-election bid. They criticized individuals and issue stances closely identified with Senator McCain's general-election opponent. They targeted Republican turnout in regions of Arizona crucial to Senator McCain's statewide race. They referenced candidates whose performances, because of their presence on the Arizona Republican ticket, would affect Senator McCain's ability to attract votes. And they allowed Senator McCain to burnish his credentials with Arizona Republicans by showing that he is a party leader and a "team player." In sum, FOJM's campaign communications ultimately furthered Senator McCain's candidacy, and references to other candidates were critical to that objective. The Commission should therefore find that FOJM's communications were consistent with its authorized committee status.

2. FOJM Was Permitted to Sponsor Independent Communications that Reference Other Candidates

Even if FOJM's communications had not ultimately supported Senator McCain's candidacy, the Commission has already rejected the DCCC's contention that authorized committees may not sponsor independent communications referencing other candidates.

As discussed above, in Matter Under Review 3676, a congressional candidate's authorized committee independently ran an advertisement that included "Bart Stupak supports

<sup>18</sup> It should be noted that FOJM spent \$22,934,151.25 during the 2010 election cycle to re-elect Senator McCain. Expenses for public communications that referenced down-ticket Republican candidates and their opponents comprised only a small portion of that overall sum.

<sup>19</sup> Buse Aff. at ¶ 3.

<sup>20</sup> Buse Aff. at ¶ 3.

Bill Clinton for President.”<sup>21</sup> Like the DCCC, the Commission’s Office of General Counsel reasoned that statutory language permitted “authorized committees to support other candidates in only a limited way: by making contributions of \$1,000 or less.”<sup>22</sup> Specifically, the Office of General Counsel attempted to argue that:

Designation as a principal campaign committee or authorized committee ensures that the public knows that contributions made to and expenditures made by that committee will be used to further a particular candidate’s election... Permitting principal campaign committees to make independent expenditures, which cannot be limited, would change the very nature of the committee.

Sponsoring *any* independent ads that referenced other candidates therefore “jeopardize[d] the committee’s authorized status,” the Office of General Counsel asserted.<sup>23</sup>

Four Commissioners rebuffed the Office of General Counsel and found that the authorized committee could permissibly sponsor an ad that included “Bart Stupak supports Bill Clinton for President.”<sup>24</sup> Among them, Commissioner Thomas equated revocation of an authorized committee’s status to imposing a penalty on independent speech, like those struck down by the Supreme Court in *Buckley*.<sup>25</sup> In fact, he noted that the Office of General Counsel’s statutory construction was directly contrary to the constitutional distinctions drawn in *Buckley* because it afforded contributions “*more* protection under the [F]irst [A]mendment than independent expenditures—not less.”<sup>26</sup> Moreover, the governmental interest identified by Office of General Counsel named—ensuring that authorized committees “further a particular candidate’s election”—was clearly not sufficiently “compelling” to justify an independent-speech restriction.<sup>27</sup> Finally, Commissioner Thomas noted:

The Office of General Counsel argues that Congress intended §432(e)(3) to prohibit independent expenditures by authorized committees. Yet, the language of §432(e)(3) does not actually say that independent expenditures by authorized committees are prohibited. In fact, the term ‘independent expenditure’ is not even mentioned in §432(e)(3). Nor does the legislative history uphold the Office of General Counsel’s construction of §432(e)(3).<sup>28</sup>

<sup>21</sup> See generally, Fed. Election Comm’n, Matter Under Review 2841 (1995).

<sup>22</sup> Fed. Election Comm’n, Matter Under Review 2841, First General Counsel’s Report at 12 (Dec. 2, 1994).

<sup>23</sup> Fed. Election Comm’n, Matter Under Review 2841, First General Counsel’s Report at 13 (Dec. 2, 1994).

<sup>24</sup> Fed. Election Comm’n, Matter Under Review 2841, Certification (Jan. 10, 1994).

<sup>25</sup> Fed. Election Comm’n, Matter Under Review 2841, Statement of Reasons by Commissioner Thomas at 1-2 (Feb. 8, 2005).

<sup>26</sup> Fed. Election Comm’n, Matter Under Review 2841, Statement of Reasons by Commissioner Thomas at 8 (Feb. 8, 2005).

<sup>27</sup> Fed. Election Comm’n, Matter Under Review 2841, Statement of Reasons by Commissioner Thomas at 8 (Feb. 8, 2005).

<sup>28</sup> Fed. Election Comm’n, Matter Under Review 2841, Statement of Reasons by Commissioner Thomas at 6 (Feb. 8, 2005).

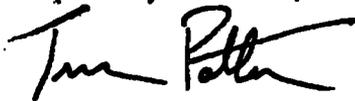
Commissioner Thomas concluded that Congress could not have intended to enact such a constitutionally untenable restriction without at least some analysis or explanation.<sup>29</sup>

Commissioner Thomas' reasoning carries even greater weight today now that independent communications are more clearly protected as a result of *Citizens United*. The DCCC wants FOJM's authorized committee status revoked because of its independent ads that reference other candidates. Guaranteed penalties would follow this revocation, meaning that the DCCC actually advocates penalizing FOJM's independent speech. FOJM's independent speech is safeguarded from such penalties, as the Supreme Court has supplemented its *Buckley* framework by articulating broad protections for independent speech, regardless of a speaker's identity.<sup>30</sup> Particularly given the lack of support for the DCCC's position in statutory text and legislative history, the Commission should find that FOJM's communications were consistent with its authorized committee status.

## II. CONCLUSION

The DCCC's complaint offered no grounds to conclude that FOJM violated federal campaign finance laws. FOJM never sponsored a "coordinated communication" and therefore never made an in-kind contribution to Jesse Kelly for U.S. Congress and Ruth McClung for Congress. FOJM's communications also supported Senator McCain's candidacy and engaged in constitutionally protected independent speech, meaning that the communications were consistent with FOJM's authorized committee status. For all of the foregoing reasons, the Commission should find no reason to believe that a violation occurred and should dismiss this Matter.

Respectfully Submitted,



Trevor Potter  
Caplin & Drysdale, Chartered

<sup>29</sup> Fed. Election Comm'n, Matter Under Review 2841, Statement of Reasons by Commissioner Thomas at 5 (Feb. 8, 2005).

<sup>30</sup> *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 910 (2010)